IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 735

THE BALTIMORE TRANSIT COMPANY AND THE BALTIMORE COACH COMPANY,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of The United States:

The petitioners, THE BALTIMORE TRANSIT COMPANY and THE BALTIMORE COACH COMPANY, pray that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Fourth Circuit entered on January 10, 1944, enforcing, as modified, an order issued by the National Labor Relations Board against the petitioners on February 1, 1943.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported in 13 L. R. R. 663, and is printed in the proceedings in this case, R. III, 526. The findings and order of the Board appear in the record R. I, 1-22,[1] and are printed in 47 N. L. R. B. No. 18.

JURISDICTION

The judgment and decree, and the opinion of the Circuit Court of Appeals were entered on January 10, 1944. The jurisdiction of this Court is invoked under 28 U. S. C. 347 (a), Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925; and under Section 10 (e) and (f) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151 *et seq.*)

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, the Board's rules and regulations, and the National Labor Relations Board Appropriation Act, 1944, are set forth in the Appendix.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioners own, maintain and operate the mass transportation system in the City of Baltimore, Maryland, and environs. The Baltimore Transit Company owns and oper-

[1] Pursuant to a stipulation of the parties (R. III, 540) the record for the purposes of the petition for a writ of certiorari consists of three volumes. The first and second volumes contain the portions of the record printed in two volumes by the National Labor Relations Board as an appendix to its brief in the Circuit Court of Appeals. These are referred to herein as R. I and R. II, respectively. The third volume of the record contains the portions of the record printed by petitioners as an appendix to their brief in the court below and the proceedings in the Circuit Court of Appeals and is referred to herein as R. III. The certified copy of the transcript of the entire record before the Board is referred to herein as Tr. The National Labor Relations Act is referred to as the Act, and the National Labor Relations Board as the Board.

ates all electric street passenger railway cars in the city and vicinity; and all electric trackless trolleys. Its wholly owned subsidiary, the Baltimore Coach Company, owns and operates all gasoline and oil buses on fixed routes and schedules in the city and vicinity, except a comparatively few buses individually owned and operated. Petitioners' transportation facilities are concentrated mainly within the territorial boundaries of the city, and no operation crosses the State line. There are about 30 street car lines, 3 trackless trolley lines and 22 bus lines, all operating on fixed routes and schedules and charging the fares approved by the Public Service Commission of Maryland. Petitioners employ about 3,600 persons, of whom about 3,000 are employed as operators, conductors, motormen, in repair shops, and in the way and structures, power and miscellaneous departments; and about 600 in supervisory, clerical and stenographic capacities. Petitioners in 1941 had transportation revenue of $14,790,473.14, and carried 160,050,906 revenue passengers.

The Independent Union of Transit Employees of Baltimore, succeeded previous associations, and was recognized by the petitioners as the bargaining agent for their employees in November, 1937. It was dissolved during the summer of 1943, after the Board's order in this case, and is not now in existence. The labor contracts involved in this case were executed on January 1, 1942 (wages) and January 18, 1942 (working conditions). Neither these nor previous annual contracts had provisions for a closed shop or for union membership maintenance. Dues were checked off and paid to the Independent Union by petitioners on individual requests of members, but there were a number of employees who paid their dues directly to the union.

On August 6, 1937, the Transport Workers Union of America (C. I. O.) filed charges against petitioners, al-

leging violations of the Act. On September 29, 1937, the Board's Regional Director, with whom the charges had been filed, after investigation, dismissed the charges for lack of jurisdiction, and so notified the petitioners. The Union then appealed to the Board, and on April 29, 1938, the Board affirmed the Regional Director, and notified the Union. No effort was made to have the ruling reviewed by the Circuit Court of Appeals, so that it was in effect when the complaint herein was filed.

Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1300 (AFL) began to organize petitioners' employees in the fall of 1941. The complaint in this case was issued on June 2, 1942, and is based on charges filed by that Union the previous day, alleging violations of Sections 7 and 8 (1), (2) and (3) of the Act. After a hearing before the trial examiner, he filed an intermediate report in which he found that petitioners' activities affected interstate commerce, and that petitioners had committed certain unfair labor practices. Petitioners duly filed exceptions to the intermediate report, and the findings, rulings and recommendations therein, and also to rulings and incidents occurring during the hearing. Petitioners insisted throughout the hearing that the Act did not apply to them, and that their operations did not affect interstate commerce, and that the Board's prior ruling to that effect was correct and should be followed. The Board, on February 1, 1943, adopted, with minor exceptions, all of the findings and the recommendations of its trial examiner, reversed its previous ruling that it lacked jurisdiction, and ordered petitioners to cease and desist from their alleged unfair labor practices (all of which occurred during the period when the Board's ruling that the Act did not apply to petitioners was in effect); to reimburse all employees who were mem-

bers of the Independent Union for dues checked off subsequent to June 2, 1942, when the complaint herein was filed; to reinstate nine discharged employees, and to reimburse them for loss of earnings subsequent to June 2, 1942; to reinstate a tenth employee after the termination of his service in the armed forces; and to post notices of compliance and of the right of employees to join two designated labor organizations, the Amalgamated Association (AFL) and the International Brotherhood of Teamsters (AFL).

Subsequently the Board filed a petition for enforcement in the Circuit Court of Appeals for the Fourth Circuit. Thereafter, petitioners filed a motion to stay the proceedings because the Congress by the National Labor Relations Board Appropriation Act, 1944, prohibited the use of the appropriated funds in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed. The Circuit Court of Appeals denied the motion. After hearing on the Board's petition for enforcement, the Circuit Court of Appeals entered its judgment and decree requiring the Board's order to be enforced, but modifying it only so as to give petitioners credit on reimbursement for checked off dues in the amount turned over to them for the purpose by the Independent Union at the time of its dissolution.

QUESTIONS PRESENTED

1. Whether the Act applies to petitioners, who are exclusively engaged in the maintenance and operation of a local public passenger transportation system wholly within the City of Baltimore and environs, and wholly within the State of Maryland.

2. Whether the Act applies to petitioners because among the passengers who use their facilities are persons who are on their way to or from work in industrial plants, some of which are engaged in producing goods for interstate commerce; there being no obligation on petitioners to supply such plants with service of any kind.

3. Whether the Act applies to petitioners because they purchase in the City of Baltimore for their own use gas and oil which at some time "originated" outside the State, but which was not brought into the State by the petitioners or on their request; or because petitioners purchase, from time to time, outside of the State, equipment such as street cars, buses, trackless trolleys and other materials and supplies, which are used and consumed by petitioners in their own business; or because petitioners purchase in the City of Baltimore electrical energy the greater part or all of which is generated in the City of Baltimore, and none of which is brought into the State by petitioners, or by the company which sells the energy to petitioners.

4. Whether the Act applies to petitioners because they operate their vehicles on routes which pass in close proximity to stations and wharves of interstate carriers; or because, prior to the year 1935, but not thereafter, they occasionally chartered buses for trips outside the State; or because the Post Office Department requires petitioners, under compulsion of an Act of Congress, to carry a small amount of mail in sealed pouches; or because petitioners carry a small number of local newspapers; or because petitioners contract to sell space for advertising in their vehicles.

5. Whether the Board has power to reverse its prior ruling that it lacks jurisdiction over petitioners and that the Act does not apply to them; and whether the Board

is estopped from entering any order based on findings of violations of the Act by petitioners during the period when the Board's ruling that it lacked jurisdiction was in effect.

6. Whether the Board's order as modified by the judgment and decree of the Circuit Court of Appeals, is invalid in part or as a whole because:

(a) petitioners have been ordered to reimburse members of the Independent Union for their dues checked off, although there was no closed shop and no requirement of any kind that members' dues be checked off by petitioners;

(b) petitioners have been ordered to post notices stating that their employees are free to remain or become members of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1300, (AFL) and the International Brotherhood of Teamsters, etc. (AFL), and stating that employees will not be discriminated against because of membership in or activity on behalf of said designated labor organizations, thus implying an unlawful limitation on the employees' choice of union affiliation;

(c) petitioners have been ordered to reimburse employees for the amount of dues checked off subsequent to June 2, 1942, the date when the complaint herein was filed, although the Board did not reverse its ruling that it lacked jurisdiction until February 1, 1943, the date when its order was issued; to reimburse certain discharged employees for loss of earnings subsequent to June 2, 1942, although the Board's ruling that it lacked jurisdiction was not reversed until February 1, 1943; and to reinstate certain discharged employees with seniority rights and other privileges from the dates of the respective discharges, although such discharges occurred not only prior to February 1, 1943, but even prior to June 2, 1942;

(d) the findings of the Board that petitioners have engaged in and are engaging in unfair labor practices in violation of Section 8 (1), (2) and (3) of the Act are not supported by substantial evidence;

(e) petitioners were not accorded a fair and impartial hearing by the Board's trial examiner.

7. Whether the Act of Congress known as Title IV of Public Law 135 of the 78th Congress, approved July 12, 1943, cited as "National Labor Relations Board Appropriation Act, 1944", prohibits the Board from prosecuting its petition for enforcement during the effective period of said Act.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question which has never been but should be settled by this Court, namely, whether the Act applies to an employer engaged exclusively in the maintenance and operation of a local public passenger transportation system (here, street car and bus lines), wholly intrastate in character.

The question is obviously one of great and far-reaching importance, for it involves the legal status, so far as the application of the Act is concerned, not only of intrastate street car and bus companies but also of taxicab, drive-it-yourself and truck companies, and other employers whose operations do not extend beyond state lines. If the decision of the lower Court is permitted to stand, the basis and purpose of state regulatory acts will be seriously impaired if not destroyed; and state labor relations boards, wherever they have been created, will be deprived of all useful jurisdiction. Moreover, if the Board now has the power to regulate the labor relations of wholly local and intrastate utilities, it may eventually become futile for state com-

missions to attempt to regulate rates, quality and quantity of service of such utilities; and all such regulation will in the end become federalized. The effect of the holding of the Court below is so to apply the Act as to regulate practically all industry, "thus invading the reserved powers of the States over their local concerns", and nullifying the limitations on the application of the Act as determined by this Court in *N. L. R. B. v. Jones & Laughlin*, 301 U. S. 1, 29 (1937); *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 466-467 (1938); and *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 221-222 (1938).

The principal ground upon which the Board assumed jurisdiction of this case was that, among the passengers who use the petitioners' transportation facilities, are persons who are on their way to or from work in industrial plants, some of which are engaged in production for interstate commerce,—there being no obligation, however, on the petitioners to supply such plants with service This is the first time this question has ever been presented to this Court; and never before has the determination as to whether an industry is subject to federal regulation and to the terms of the Act been made to depend not upon what the industry itself does, but upon what its customers and patrons may do. Such a method of determining jurisdiction is wholly inconsistent with the principles recently approved by this Court in *McLeod v. Threlkeld*, 319 U. S. 491 (1943) and *Higgins v. Carr Bros. Co.*, 317 U. S. 572 (1943). This Court held, many years ago, that the business of local public passenger transportation was not subject to federal regulation under the commerce clause of the Constitution of the United States, *Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21 (1904); and that holding is now ignored by the decision of the Court below. Indeed, the

result so achieved is contrary not only to the prior ruling of the Board itself as to the petitioners herein, but also to decisions of the Board in similar cases such as *Yellow Cab and Baggage Co.*, 17 N. L. R. B. 469; *San Diego Ice & Cold Storage Co.*, 17 N. L. R. B. 422; and *Cactus Mines Co.*, 21 N. L. R. B. 677.

The lower Court in its opinion, relying upon the language of this Court in *Wickard v. Filburn*, 317 U. S. 111 (1942), has indicated that it is not necessary for the employer's activity to have a direct effect upon interstate commerce, provided it does exercise "a substantial economic effect" thereon. Thus, the Court below utilized a statement by this Court, in a case involving the Agricultural Adjustment Act of 1938, to nullify the settled doctrine applied in this Court's prior decisions construing the National Labor Relations Act. We believe this Court should clarify the situation, and should settle the question as to whether the rule in the *Jones & Laughlin* and other Labor Relations Act cases, that the effect on interstate commerce must be immediate, close and intimate, not indirect or remote, in order to give the Board jurisdiction, still is the law.

2. The subsidiary reasons advanced by the Board and by the Court below in support of jurisdiction are predicated upon principles never recognized by this Court. The doctrine that local purchases of power, and of materials and supplies "originating" outside of the State, place a purchaser in interstate commerce, or cause him to affect commerce to a degree authorizing federal regulation, so completely ignores all the prior determinations by this Court that when a journey across a state-line ends interstate commerce terminates, as to require this Court to review the decision of the Court below. A similar question

which should be reviewed is the effect, if any, of purchases from time to time of equipment and supplies by petitioners outside of the State, and thereafter used and consumed in their own business.

The determination by the Board and by the lower Court that such activities as the sale of advertising space in the petitioners' vehicles, the local transportation of such articles as newspapers or a few sacks containing mail (under compulsion of federal law), or the operation of local vehicles on routes near railroad depots or wharves, constitute or affect interstate commerce is plainly inconsistent with the adjudicated cases, and should be reviewed.

3. This case involves an important question affecting the Board and other administrative agencies, to wit: (a) whether the Board has power to reverse its own prior ruling that it lacks jurisdiction over petitioners, which had been in effect for more than five years; or, (b) whether the Board, if it has such power, may enter an order based on findings of violations occurring during the period when its ruling that the Act did not apply was in full force and effect. In this case the Board has attempted to apply remedies retroactively. There is no case supporting such action. The Board has declined to be bound by the principle of equitable estoppel, and the lower Court has confused the issue by deciding that "there is nothing unreasonable in requiring the company to take action to undo the effect of unfair labor practices allowed to continue after that date" (referring to June 2, 1942, the date of the issuance of the complaint), and then having said this, by approving the action of the Board in applying remedies for alleged unfair labor practices before that date. The question as to whether the Board may rule two ways, and then impose retroactive requirements so as to nullify its first ruling

ab initio, to the detriment of those who rightfully relied thereon, should be considered and determined by this Court.

4. That part of the decision of the lower Court which enforces the checked-off union dues reimbursement provision of the Board's order is in conflict with twelve decisions in five circuits on a like question,[2] and goes far beyond the limiting principles on which such an order was upheld by this Court in *Virginia Electric & Power Co. v. N. L. R. B.*, 319 U. S. 533, (1943), where there was a closed shop, and where this Court approved reimbursement because of the particular facts of that case.

5. That part of the Board's order, enforced by the lower Court, requiring petitioners to post notices that their employees are free to remain members of or join two designated unions is in conflict with numerous decisions of other Circuit Courts of Appeals,[3] wherein such action by the Board has been uniformly held invalid because it implies a restriction on choice of union affiliation. This is an important question which has not been, but should be, settled by this Court.

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[2] *Western Union Telegraph Co. v. N. L. R. B.*, 113 F(2d) 992; *Corning Glass Works v. N. L. R. B.*, 118 F(2d) 625; *N. L. R. B. v. West Kentucky Coal Co.*, 116 F(2d) 816; *N. L. R. B. v. U. S. Truck Co.*, 124 F(2d) 887; *N. L. R. B. v. Gerity Whitaker Co.*, 137 F(2d) 198; *N. L. R. B. v. J. Greenebaum Tanning Co.*, 110 F(2d) 984; *A. E. Staley Mfg. Co. v. N. L. R. B.*, 117 F(2d) 868; *Reliance Mfg. Co. v. N. L. R. B.*, 125 F(2d) 311; *Kansas City Power & Light Co. v. N. L. R. B.*, 111 F(2d) 340; *N. L. R. B. v. Southwestern Greyhound Lines*, 126 F(2d) 883; *N. L. R. B. v. Continental Oil Co.*, 121 F(2d) 120; *N. L. R. B. v. Atlas Press Co.*, 11 L. R. R. 519.

[3] *N. L. R. B. v. Weirton Steel Co.*, 135 F(2d) 494; *N. L. R. B. v. Baldwin Locomotive Works*, 128 F(2d) 39; *Westinghouse Electric & Mfg. Co. v. N. L. R. B.*, 112 F(2d) 657; *Roebling Employees Assn., Inc., v. N. L. R. B.*, 120 F(2d) 289; *Colorado Fuel & Iron Corp. v. N. L. R. B.*, 121 F(2d) 165; *Reliance Mfg. Co. v. N. L. R. B.*, 125 F(2d) 311; *N. L. R. B. v. American Rolling Mill Co.*, 126 F(2d) 38; *N. L. R. B. v. Precision Castings Co.*, 130 F(2d) 639; *N. L. R. B. v. New Idea, Inc.*, 133 F(2d) 195; *N. L. R. B. v. Cleveland-Cliffs Iron Co.*, 133 F(2d) 295; *N. L. R. B. v. Harbison-Walker Refractories Co.*, 135 F(2d) 837; *N. L. R. B. v. Standard Oil Co.*, 138 F(2d) 885; *N. L. R. B. v. Elizabeth Arden, Inc.*, 139 F(2d) 488.

6. The order of the Board is not supported by substantial evidence, particularly in respect to alleged violations of Section 8 of the Act. The action of the trial examiner, in his rulings on evidence, his and the Board's attorneys' attitude toward petitioners' witnesses, and in attempting to minimize and destroy petitioners' evidence, resulted in a denial of a fair hearing and of due process of law.

7. The correct interpretation and application of the prohibitory provisions of the National Labor Relations Board Appropriation Act, 1944, has not been, but should be, settled by this Court. The Board has indulged in various interpretations, staying or dismissing some complaint cases, and attempting to proceed with others, despite the Congressional mandate. The Board seeks to make the word "complaint" used by Congress synonomous with the word "charge", thus giving the provisions an interpretation entirely different from the clear meaning of the language used. It is important that this Court end this confusion.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fourth Circuit, and submit herewith their brief in support of this petition.

Respectfully submitted,

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Dated: February 28, 1944.